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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

FILE:

Office: TEXAS SERVICE CENTER

Date:

DEC 21 2010

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a publisher. It seeks to employ the beneficiary permanently in the United States as an editor at large pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director denied the petition on October 4, 2007. He determined that the petitioner failed to submit persuasive evidence to demonstrate that the beneficiary possessed a four-year single source U.S. bachelor's or higher degree or a foreign equivalent degree in liberal arts, journalism, or communications and five years of experience in the proffered position before the priority date and was therefore not qualified for the proffered position.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The specific issue on appeal is whether or not the beneficiary's U.S. bachelor's degree in economics and visual arts qualifies him for the proffered position of editor at large and for which a bachelor's degree or equivalent in liberal arts, journalism, or communications is required.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N

¹ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

158 (Act. Reg. Comm. 1977). Here, the Form ETA 9089 was accepted for processing on October 23, 2006.² The Immigrant Petition for Alien Worker (Form I-140) was filed on June 26, 2007.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a

bachelor's degree rather than a "foreign equivalent degree."³ In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Cf. 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b),

³ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(5) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The job qualifications for the certified position of editor at large are found on Form ETA 9089 Part H:

H.4. Education: Minimum level required: bachelor's degree.

4-B. Major Field Study: Liberal arts, journalism, or communications.

7. Is there an alternate field of study that is acceptable.

The petitioner checked "no" to this question.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner did not indicate an answer to this question.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: 60 months in the position offered,

10. Is experience in an alternate occupation acceptable?

The petitioner indicated that 60 months experience in the occupations of reporter, journalist, or editor would be acceptable.

As set forth above, the proffered position requires four years of college culminating in a bachelor's degree in liberal arts, journalism, or communications and five years of experience in the job offered or in the related occupations of reporter, journalist, or editor.

On Part J of the Form ETA 9089, eliciting information of the names and addresses of schools, colleges, and universities attended (including trade or vocational training facilities), the beneficiary indicated that he attended Duke University and received a bachelor's degree in economics and visual arts in 1999. The beneficiary signed the form under the penalty of perjury that the information was true and correct.

In corroboration of the Form ETA 9089, the petitioner provided copies of the beneficiary's bachelor of arts degree from Duke University in 1999. The record also contains information from the websites of Duke University, the State University of New York, Harvard University, the University of Texas, the University of Massachusetts, Tulane University, DePaul University, the University of Illinois, and Penn State, which demonstrates that economics studies are generally located within schools of liberal arts within U.S. universities. The record also contains an evaluation from [REDACTED] of [REDACTED]

The Form ETA 9089 does not specify that the minimum academic requirement of a bachelor's degree in liberal arts, journalism, or communications might be met through a foreign equivalent degree in another field. The labor certification application, as certified, does not demonstrate that the petitioner would accept a degree in a field other than liberal arts, journalism, or communications when it tested the labor market.

The ETA 9089 indicates that the DOL assigned the occupational code of 27-3041.00 and title editor to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/> (accessed on September 16, 2010 under editors, DOL's updated correlative occupation) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four generally requiring a bachelor's degree for the occupation type closest to the proffered position.

The record of proceeding contains information from the websites of Duke University, the State University of New York, Harvard University, the University of Texas, the University of Massachusetts, Tulane University, DePaul University, the University of Illinois, and Penn State, which demonstrates that economics studies are generally located within schools of liberal arts within U.S. universities.

The record also contains an evaluation from [REDACTED], dated October 16, 2007. The evaluation states that, within the U.S. system of higher education, the study of economics is a liberal art along with psychology, history, anthropology, political science, and sociology offered through schools of liberal arts and sciences. The evaluator states that the beneficiary received a bachelor of arts degree with a major in economics from Duke University in 1999 and that he fulfilled the remainder of his general education requirements in the field of liberal arts including 120 semester hours, 90 of which were devoted to liberal arts. He additionally had completed the departmental requirements for the major of visual arts, though Duke University does not grant more than one undergraduate degree at a time. [REDACTED] concludes that the beneficiary's degree in economics constitutes a liberal arts degree.

The AAO notes that the record reflects that the beneficiary took classes in French, rhetoric, philosophy, psychology, design, Spanish, architecture, art, music, political science, marketing management, history, etc. as part of his degree from Duke University in economics and visual arts. The AAO finds such classes to be part of a liberal arts curriculum.

The AAO also notes that Duke University's liberal arts program under the Trinity College of Arts and Sciences maintains four sets of requirements for graduation.

- Areas of knowledge requirements: studies of arts, literature, and performance; civilizations; social sciences; natural sciences; and quantitative studies.
- Modes of inquiry requirements: cross-cultural inquiry; science, technology, and society; ethical inquiry; foreign language; writing; and research.
- Small group learning experience requirements.
- Major requirements.

Thus, a degree from Duke University's Trinity College of Arts and Sciences requires a student to complete a wide range of forms of study and approaches to study. Though the beneficiary may possess a bachelor's degree in economics and visual arts, he had to complete diverse types of liberal

arts classes in order to obtain his degree from Duke University's Trinity College of Arts and Sciences. The AAO accordingly finds that the beneficiary possesses the equivalent to a bachelor's degree in liberal arts from a U.S. university.

The ETA 9089 indicates that the DOL assigned the occupational code of 27-3041.00 and title editor to the proffered position. See <http://online.onetcenter.org/crosswalk/> (accessed on September 16, 2010). The O*NET online database⁴ states that the occupation of editor falls within Job Zone Four generally requiring a bachelor's degree. A search for additional information in DOL's Occupational Outlook Handbook (OOH) for editors leads to authors, writers, and editors.⁵ The OOH has the following information about the required education for editors, which draws a clear nexus to the specific type of work employees perform:

Education and training. A bachelor's degree or higher is typically needed for a job as an author, writer, or editor. Because writing skills are essential in this occupation, many employers like to hire people with degrees in communications, journalism, or English, but those with other backgrounds and who can demonstrate good writing skills may also find jobs as writers. Writers who want to focus on writing about a particular topic may need formal training or experience related to that topic. For example, textbook writers and fashion editors may need expertise in their subject areas that they acquired either through formal academic training or work experience. The Internet and other media allow some people to gain writing experience through blog posts, text messages, or self-publishing software. Some of this writing may lead to paid assignments based upon the quality of the writing, unique perspective, or the size of the potential audience, without regard to the absence of a degree.

(Emphasis added). [REDACTED] confirm that the offered position generally requires at least a bachelor's degree. The [REDACTED] demonstrate that the education required for the proffered position, an editor at large, depends upon the required duties for that position.

The AAO notes that Part H Section 11 of the ETA Form 9089 further delineates the required duties for the position of editor at large. Specifically, the beneficiary must "[c]oordinate and direct journalistic coverage of lifestyle, culture, arts, entertainment, politics and careers geared toward U.S. Hispanic and Latin American markets for print and online magazines."

Due to these job duties listed on the labor certification, the AAO finds that the position requires an individual who possesses a diverse range of talents and intellectual perspective, from knowledge of current political and lifestyle events to knowledge of the inner economic and logistical demands of a publishing business.

⁴O*NET, located at <http://online.onetcenter.org>, is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations" (accessed September 30, 2010).

⁵The OOH, located at <http://www.bls.gov/OCO>, is a nationally recognized source of career information published by the DOL's Bureau of Labor Statistics.

Due to the beneficiary's prior educational background in economics and visual arts from Duke University's Trinity College of Arts and Sciences in addition to his wide variety of liberal arts studies there, the beneficiary appears to be aptly suited for the proffered position of editor at large.

The AAO finds that the beneficiary's education correlates to the education required by the position. Thus, the beneficiary does possess a degree in the correct field of liberal arts, journalism, or communications for the position as his degree in economics and visual arts has prepared him to perform the required job duties of editor at large for the petitioner.

The beneficiary does have a United States baccalaureate degree or a foreign equivalent degree to liberal arts, journalism, or communications and meets the requirements of the labor certification, and, thus, does qualify for preference visa classification under section 203(b)(2) of the Act.

The petitioner has also demonstrated that the beneficiary possesses the requisite experience for the position. The beneficiary has worked as a features journalist, an editor, and an editor at large since May 2000. The priority date is October 23, 2006. The AAO finds that the petitioner has provided sufficient documentation regarding the beneficiary's five years of progressive experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.